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Alta Health Strategies, Inc., a Delaware corporation v. CCI Mechanical Service, a division of CCI Mechanical, Inc., a Utah corporation : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ALTA HEALTH STRATEGIES, INC., a Delaware corporation, Plaintiff/Appellant, v. CCI MECHANICAL SERVICE, a division of CCI Mechanical, Inc., a Utah corporation, Defendant/Appellee.	Case No. 960331-CA Civil No. 930903151PD Priority No. 15

REPLY BRIEF OF APPELLANT

Appeal from the Third Judicial District Court,
Salt Lake County, Judge Leslie A. Lewis

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STATEMENT OF FACTS

1. Before the Christmas air conditioning failure, Plaintiff had millions of dollars worth of computer equipment in its computer room that Plaintiff had purchased from Unisys. (R. at 548.) Plaintiff tried to stay on the leading edge of the computer industry. (R. at 361.) For example, the Unisys mainframe computer had such large capacity that it was one of only sixteen in the world and ten of these mainframes were in Europe. (R. at 361.)

2. An HDA is a unit with an aluminum platter and read-write heads for the information requested by other components of the computer system. (R. at 390 and 636.) There are four platters and two HDAS in each 9494-24 cabinet. (R. at 391.) The cost just to replace all the HDAs in Plaintiff's computer room was a million-dollar expenditure. (R. at 513.)

3. Dale Brown was the Unisys employee responsible for Plaintiff's account from 1984 until 1995. (R. at 524.) Mr. Brown appeared at trial pursuant to a subpoena. (R. at 523.) The "only price" Mr. Brown had for the new-model HDAs was $19,300 per HDA. (R. at 547.) Mr. Brown testified that he did not know what happened to the destroyed HDAs after they were removed from Plaintiff's computer room. (R. at 555.)

4. Only Unisys, not Plaintiff, had the information on the age or installation date of the HDAs that had been installed by Unisys in Plaintiff's computer room. (R. at 401.) That Unisys had exclusive possession of the information on HDA installation was

demonstrated by the testimony of Plaintiff's Director of Operations, Kent Broadhead. (R. at 440.) Mr. Broadhead stated that he had no idea when the HDAs were placed into service and Plaintiff had no installation records. (R. at 472.) "Q Mr. Broadhead, who has the records for the HDAs and for the technical reasons HDAs failed? A That would be Unisys Corporation." (R. at 508.)

5. The Unisys customer service engineer assigned to perform nightly preventative maintenance on Plaintiff's computer system, Jim Bolinder, was at trial by subpoena. (R. at 607-609.) Mr. Bolinder's notes of service performed were not shared with Plaintiff. (R. at 619.) Mr. Bolinder testified that he had no way to know when the damaged HDAs were placed into service, since Unisys had destroyed the records. (R. at 636.)

6. The computer room manager, Russell Loudon, testified that by what he heard from Plaintiff he thought the air conditioning would switch over if there was a problem. (R. at 408, 415, and 443.) Mr. Loudon certainly understood that the changeover would switch over. (R. at 432.) Plaintiff's employee that supervised air conditioning in Plaintiff's buildings other than the computer room, David English, testified that a week before December 25 he asked one of Defendant's two service employees the reason that the changeover had not automatically switched over and the employee told Mr. English that the switchover was 95 to 99 percent finished except for an electronic part. (R. at 645 and 654.) Mr. English

asked Defendant's employee if he should tell Mr. Broadhead that the switchover was inoperable, but the service employee, who was right outside Mr. Broadhead's office at the time, said he would stay and talk to Mr. Broadhead. (R. at 654.) Before December 25, Mr. Broadhead was never told by Defendant that the switchover was not working. (R. at 450-51 and 461-62.)

7. Mr. Broadhead met and confirmed with Mr. Loudon three times that the auto switchover was working before leaving the computer room unmanned on December 25. (R. at 451 and 508.) Defendant's employee could not recall whether or not he told Plaintiff that the switchover would work except for power failures. (R. at 579.)

8. None of Plaintiff's employees had experience, training or knowledge of air conditioning. (R. at 444 and 692-93.) For the ten years up to 1991, all air conditioning service and maintenance work for Plaintiff's computer room was performed by Defendant. (R. at 357.)

9. The assigned Unisys engineer, Mr. Bolinder, testified that in his opinion the probable cause of the HDA crashes on December 26 was the high temperatures from the air conditioning failure. (R. at 642.)

ARGUMENT I
PLAINTIFF OFFERED EVIDENCE TO ALLOW THE JURY TO MAKE A REASONABLE ESTIMATE OF DAMAGES

The jury would not have been required to resort to speculation in considering Plaintiff's damages. Plaintiff proved its damages

with reasonable certainty, but Plaintiff did not use the "ordinary" measure of damages. The personal property destroyed by the high temperatures during the air conditioning failure was not the kind of "ordinary" property that fits within a general rule. For example, the general rule applies to instances where a damaged item of property is either replaced or components are repaired.

In this case, the damaged HDAs were merely components of the computer disk drives that were part of a larger computer system. The middle-aged HDAs damaged in the excessive temperatures were neither repaired nor replaced, since the destroyed HDAs were replaced with comparable space on new-model computer disk drives. Mr. Broadhead best explained the Plaintiff's procedures:

> Q. How many pieces -- well, what type of pieces of equipment were damaged?
> A. There were seven HDAs, components of a disk drive.
> Q. Approximately how many HDAs would have been on the floor in December, 1991?
> A. Memory doesn't serve real well, but it would have been over fifty.
> Q. Okay. The seven HDAs that you mentioned had been damaged, were these all replaced?
> A. No, they were not. Not with like units.
> Q. After Christmas Day, 1991, did you replace the seven HDAs with the newest model HDA?
> A. We did buy the comparable amount of space in the new drives.

(R. at 458-459.)

Defendant's argument that Plaintiff did not comply with the "ordinary" measure of damages under the general rule fails to account for the exclusive possession of all evidence of value by a third party. The seller of Plaintiff's computer equipment, Unisys,

had all information necessary to calculate market value under the "ordinary" measure of damages. The Unisys employee responsible for Plaintiff's account, Dale Brown, explained that the $19,300 Plaintiff was charged for each of the new-model HDAs was "the only price" Unisys had for these HDAs. Unisys employees testified under subpoena that they did not have information on the age or installation date of the HDAs. Unisys employees asserted that Unisys had destroyed the records on the age or installation date of the HDAs and had no way to know this information at the time of trial. The age and installation date of the damaged HDAs would be essential to the calculation of market value under the "ordinary" measure of damages.

The purchase of equivalent space on the new-model HDAS saved Plaintiff at least $100,000, rather then a simple replacement of the seven destroyed HDAS with identical middle-aged HDAs. Thus, the damages Plaintiff seeks from Defendant are $100,000 lower than if Plaintiff had merely replaced the middle-aged HDAs with the same model HDAs. Defendant should be grateful that Plaintiff reduced the potential damages by $100,000. Instead, Defendant argues that Plaintiff's successful mitigation of damages precludes recovery on the grounds that it does not conform to the general rule.

Plaintiff had millions of dollars worth of equipment in its computer room. At the time of the air conditioning failure Plaintiff was one of only sixteen customers in the world that had the latest Unisys mainframe computer. Unisys installed another

mainframe computer nearly every year for Plaintiff. Plaintiff produced evidence that it was charged $134,900 for the comparable space on the new model HDAs. The evidence was that $19,300 per HDA was the only price available to Plaintiff for the HDAs. An evaluation of the difference in market value of Plaintiff's computer equipment before and after the computer room air conditioning failure would not be relevant in ascertaining Plaintiff's "non-ordinary" damages.

Defendant argues that Plaintiff failed to offer evidence of salvage value for the damaged HDAs. Ironically, Defendant relies on the testimony of Mr. Brown, but Mr. Brown testified that he did not know what happened to the destroyed HDAs. Mr. Bolinder agreed that HDAs were "rebuilt" and put back into use. However, neither Mr. Brown nor Mr. Bolinder testified that Plaintiff was paid or received any consideration for the damaged HDAs. Concededly, the HDAs had value once they were rebuilt, but the HDAs were not useable after damage from high temperatures. (R. at 627.)

The testimony by Mr. Brown that Unisys did charge Plaintiff to replace the five damaged HDAs with seven new-model HDAs was unrefuted by Defendant. (R. at 555.) Exhibits 7 and 8 were for the seven 9613 HDAs ordered by Plaintiff to replace HDAs "that were deemed unrepairable after the Christmas Day air conditioning failure." (R. at 537 and 540.) The orders were shipped to "Alta Health in Salt Lake." (R. at 538 and 540.) Plaintiff was liable for the transportation charges for the HDAs shipped after the

Christmas air conditioning failure. (R. at 531 and 547.) Exhibits 7 and 8 showed Unisys pricing for the HDAs. The "unit price" of $22,706 per HDA on the orders was "the list price for an individual disk drive." (R. at 539-540.) The "discount price" on the orders was $3,406 lower or $19,300 per HDA. (R. at 539-540.) "The net price is an agreed-to discounted price..." to Alta Health. (R. at 544.) As Mr. Brown stated there were no unusual price considerations. (R. at 555.) Mr. Brown concluded with his opinion that the $19,300 per HDA "discount price" of Unisys was "the only price I have." (R. at 547.)

Finally, Defendant asserts that Exhibits 2, 3, 7 and 8 were orders not billing invoices. Mr. Bolinder plainly stated that the Customer Service Orders, Exhibits 2 and 3, were to specifically bill Plaintiff. (R. at 614.) Indeed, Mr. Bolinder explained that he wrote up Exhibit 2, because the charges were outside the maintenance agreement and, therefore, Plaintiff would have to pay for the work. (R. at 615.) Plaintiff was charged more than $1,600 for the service work in Exhibits 2 and 3. (R. at 616.) During recross-examination by counsel for Defendant, Mr. Brown similarly confirmed that Plaintiff was charged for the replacement HDAs, documented in Exhibits 7 and 8, since they were outside the maintenance agreement:

> Q. Mr. Brown, you testified that as far as you know this is the only event where Unisys has charged a customer for the replacement of the HDAs, whether it's Alta or anyone else; is that right?

A. I can only speak to my customers that I know here.

Q. So the customers that you represent, that's the only event. Who made the decision that that was going to occur?

A. I think it was Ken Malone's organization. Maybe not him individually, but his organization.

(R. at 561.)

Plaintiff's damages from the destruction of HDAs by the air conditioning failure cannot be calculated under the "ordinary" measure of damages. The HDAs were a component of a multi-million dollar computer system that were not either repaired or replaced under the general rule of damages. Moreover, the market value of the destroyed HDAs could not appraised without information in the exclusive possession of Unisys that was discarded after one year. Plaintiff did provide evidence that it was charged a "discount price" for new-model HDAs used to replace the damaged middle-aged model HDAs that saved Plaintiff $100,000. Finally, Plaintiff's computer system was on the leading edge of technology and Unisys had only one price for the HDAs sold to Plaintiff.

ARGUMENT II
PLAINTIFF PRODUCED EVIDENCE THAT IT RELIED ON DEFENDANT'S NEGLIGENT MISREPRESENTATION

Defendant argues that none of Plaintiff's employees testified that Defendant had misrepresented to Plaintiff that the automatic switchover was operable. However, all of Plaintiff's employees testified that Defendant represented to Plaintiff that the auto switchover was working on December 25. First, Plaintiff's computer

room manger, Mr. Loudon, testified that by what he heard from Defendant he certainly understood that the air conditioning would switch over if there was a problem. Similarly, Plaintiff's employee that supervised air conditioning in all buildings other than the computer room, David English, testified that a week before Christmas he asked one of Defendant's two service employees why the changeover had not automatically switched over, since he understood it was operable, and he was told that the switchover was 95 to 99% finished except for an electronic part. Mr. English was concerned enough by this new information that he asked whether he should notify Mr. Broadhead. Defendant's employee, who was right outside Mr. Broadhead's office at the time, said he would stay and tell Mr. Broadhead that the switchover was inoperable. Mr. Broadhead was never told before December 25 that the auto switchover was not working.

Defendant repeatedly alleges that Mr. Broadhead never had any conversations with any of Plaintiff's employees regarding the switchover. Mr. Broadhead did meet and confirm with Mr. Loudon three separate times that the auto switchover was working before he authorized leaving the computer room unmanned on December 25. More importantly, Defendant's responsible employee testified at trial and **never denied** that he represented to Plaintiff that the auto switchover was completely operable. Defendant's employee simply could not recall what he represented to Plaintiff concerning the switchover.

Finally, Defendant contends that Plaintiff had to notify Defendant of the decision to leave the computer room unmanned and had to exercise care to protect its interest when it relied on Defendant's representations. Plaintiff agrees with these principles, but Plaintiff had no employees with experience or knowledge of air conditioning. By contrast, Defendant had a strong pecuniary interest in the switchover project and had exclusive expert knowledge of the status and nature of the air conditioning work. Plaintiff had relied, without further investigation, on Defendant's advice for the preceding ten years of service and maintenance. Plaintiff may recover for Defendant's misrepresentation where Defendant had a pecuniary interest in the transaction, Defendant was in a superior position to know material facts, and Defendant should have reasonably foreseen Plaintiff was likely to rely on the statement. *Price-Orem Inv. Co. v. Rollins, Brown & Gunnell*, 713 P.2d 55, 59 (Utah 1986).

ARGUMENT III
PLAINTIFF HAD EXPERT TESTIMONY THAT THE AIR CONDITIONING FAILURE CAUSED THE DAMAGED HDAs

The most-experienced and knowledgeable witness that testified concerning the Unisys computer system was Mr. Bolinder. Mr. Bolinder testified at trial, over repeated objections of Defendant's counsel, that in his expert opinion the HDAs were damaged by the high temperatures on December 25. There was additional evidence admitted at trial to support Plaintiff's claim that the failure of the changeover to switch over on December 25

caused the destruction of HDAs, but the testimony of Mr. Bolinder by itself entitled Plaintiff to submit the causation issue to the jury.

Defendant argues that, based primarily on the testimony of Mr. Loudon concerning the "UPS" system, Plaintiff failed to prove why the air conditioning failed to work on December 25. Mr. Loudon testified that he did not know whether the UPS system or the outside electrical power was on when he arrived at the computer room. Mr. Loudon recalled that there must have "been a power hit that knocked things down." (R. at 409.) In particular, he conceded that there probably was a power "bump" that the UPS system was supposed to handle, but how the power went "off and came back on again is still kind of a mystery to me." (R. at 424-25.) Thus, Defendant cannot cite any evidence or the operation of the UPS to show that any witness contradicted or discredited the opinion by Mr. Bolinder that the high temperatures caused the HDA failures.

CONCLUSION

Plaintiff's evidence was that it incurred $134,900 in damages and $1,606 in service work to replace the HDAs destroyed by high-heat on December 25. Plaintiff's damages cannot be classified as either repair or replacement damages under the general rule for damages. Plaintiff could have purchased the identical middle-aged HDAs to replace the damaged HDAs. However, Plaintiff saved $100,000 by ordering seven of the new-model HDAs to provide equivalent space to replace the damaged HDAs. The "ordinary"

measure of damages using market value cannot account for Plaintiff's losses, since the HDAs were components of a multi-million dollar computer system that was state-of-the-art technology and Unisys had exclusive possession of the pricing and depreciation data necessary to calculate market value.

Plaintiff's employees all testified that Defendant represented that the auto switchover was operational. In fact, this representation was indispensable to the decision to allow the 24-hour computer room to be unmanned for the first time ever. Plaintiff had relied on Defendant's informal representations, without further investigation, for many years prior to 1991. Defendant knew Plaintiff had no employees with expertise in air conditioning. Plaintiff relied on Defendant's representation that the switchover was fully operable and Plaintiff was assured a week before December 25 that the computer room managers would be kept informed of the progress of the work.

Plaintiff had expert testimony to establish that seven HDAs were damaged by the high temperatures on December 25 when the changeover failed to switch over. The testimony by Mr. Loudon was that he did not know whether the UPS had any involvement in the Christmas Day air conditioning failure. Plaintiff's evidence of Defendant's negligent misrepresentation and the damages it caused, when viewed in the light most favorable to Plaintiff, raised questions of fact, no matter how improbable, that should have been considered by the jury.

Therefore, Plaintiff respectfully requests that the directed verdict be reversed and this action be remanded for trial by a jury.

DATED this 16 day of September, 1996.

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CERTIFICATE OF SERVICE

I, J. Angus Edwards, counsel for appellant, hereby certify that on the 16 day of September, 1996, I caused two (2) true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** to be served upon the following, by depositing copies thereof in the United States mails, postage prepaid, addressed as follows:

Mr. John L. Young
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J. Angus Edwards